No. _____

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

ALFRED G. MILLER,

*Petitioner*,

—v.—

UNITED STATES OF AMERICA,

*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Maryland v. Buie*, this Court held that the "Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." 494 U.S. 325, 337 (1990).

Does the Fourth Amendment permit a protective sweep where the police are in someone's home for reasons other than making an arrest?

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**IN THE SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 2006

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Alfred G. Miller, *Petitioner,*

*v.*

United States of America, *Respondent*

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*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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Alfred G. Miller respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 430 F.3d 93 and is contained herein as Appendix A ("App. A"). The decision of the District Court denying Petitioner's motion to suppress evidence and statements is reported at 306 F. Supp. 2d 414 and is contained herein as Appendix B ("App. B").

## JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

Following the denial of his motion to suppress evidence and statements, Petitioner, in order to preserve his Fourth Amendment claims, waived a jury and proceeded to trial based on stipulated facts. Petitioner was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and sentenced to a term of imprisonment.

As found by the District Court, the evidence adduced at the hearing on Petitioner's suppression motion showed that two New York City police officers came to Petitioner's apartment pursuant to the terms of an order of protection issued against him and in favor of his cousin and roommate, Kendu Newkirk, which authorized Newkirk to enter the apartment with police assistance in order to remove his personal belongings. Prior to going to the apartment, Newkirk told the officers that he had obtained the order of protection because Petitioner had threatened to "kick his ass and put a bullet through his head." *United States v. Miller*, 306 F. Supp. 2d 414, 416 (S.D.N.Y. 2004) (App. B at 2); *see also United States v. Miller*, 430 F3d

93, 96 (2d Cir. 2005) (App. A at 5).

Newkirk and the two officers went together to the apartment. Upon entering, the officers encountered Petitioner and his girlfriend and explained that they were there to serve the order and to assist Newkirk in picking up his belongings. While Newkirk was in the process of moving his belongings out, Petitioner asked one of the officers if he could enter a bedroom to retrieve something. After receiving permission, Petitioner went into the bedroom. The officer followed Petitioner in "[f]or safety." On their way out of the bedroom, the officer saw a shotgun in an open closet. Petitioner was arrested, whereupon he turned over a second firearm and admitted to the officers his possession of both. *Id.*

During the time that Newkirk was collecting his belongings, yet prior to the officer following Petitioner into the bedroom, the same officer had followed Newkirk into and out of the same bedroom. *Id.*

Relying on *Maryland v. Buie*, 494 U.S. 325 (1990), the District Court found that although "the risk of violence to Newkirk at that moment was limited," the officer nevertheless possessed "'articulable facts'" that "gave rise to the entirely rational inference that allowing [Petitioner] unsupervised access to the rear bedroom might prove dangerous to the safety of the officers and Newkirk," and as such "the minimal intrusion of following [Petitioner] into the rear bedroom was justified as a limited protective sweep." *Miller*, 306 F. Supp. 2d at 417 (App. B at 7).

The Second Circuit, recognizing a split in the Circuit Courts of Appeal, affirmed the District Court's extension of *Buie* to non-arrest situations and held "that specific, articulable facts giving rise to a reasonable inference of danger may justify

a protective sweep in circumstances other than during the in-home execution of an arrest warrant." *Miller*, 430 F.3d at 100 (App. A at 10). The court found, moreover, that insofar as the officer had "'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the . . . scene'," *id.*, (App. A at 10) (quoting *Buie*, 494 U.S. at 334), the "protective sweep" in this case was lawful.

## REASONS FOR GRANTING THE PETITION

### I. There is a Conflict Among the Circuit Courts of Appeals Regarding the Validity of Extending Protective Sweeps to Non-Arrest Situation.

In *Buie*, this Court held that "[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an *in-home arrest* when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those *on the arrest scene*." 494 U.S. at 337 (emphasis added). A "protective sweep" was defined as "a quick and limited search of premises, *incident to an arrest* and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* at 327 (emphasis added).

Over the past sixteen years, however, several circuit courts have extended the reach of *Buie* to non-arrest situations and to places other than where a person may be hiding. The First, Fifth, Sixth, Seventh and District of Columbia Circuits, and now the Second Circuit, have held that, notwithstanding this Court's literal holding, where an officer has reasonable and

articulable suspicion, a protective sweep need not be incident to arrest nor limited to places where persons may be hiding. *See United States v. Martins*, 413 F.3d 139, 150 (1st Cir. 2005), *cert. denied*, --- U.S. ----, 126 S.Ct. 644 (2005); *United States v. Miller*, 430 F3d at 100 (App. A at 10); *United States v. Gould*, 364 F.3d 578, 584 (5th Cir.2004) (en banc), *cert. denied*, 543 U.S. 955 (2004); *United States v. Taylor*, 248 F.3d 506, 513 (6th Cir. 2001); *Leaf v. Shelnutt*, 400 F.3d 1070, 1086-88 (7th Cir.2005); *United States v. Patrick*, 959 F.2d 991, 996-97 (D.C. Cir. 1992).

Conversely, the Eighth and Tenth Circuits have declined to extend *Buie* beyond circumstances of that case, and have permitted protective sweeps only where an arrest has been or is about to be made. *See United States v. Waldner*, 425 F.3d 514, 517 (8th Cir. 2005); *United States v. Davis*, 290 F.3d 1239, 1242 n.4 (10th Cir. 2002).

As the court below recognized, the Ninth Circuit has also "read[] *Buie* narrowly to apply only in the context of an arrest." *Miller*, 430 F.3d at 99 (App. A at 13). *See United States v. Reid*, 226 F.3d 1020 (9th Cir. 2000). In *Reid*, the court relied on the fact that the defendant was *not* under arrest as its primary reason for holding that officers were not entitled to conduct a protective sweep. Seven years earlier, however, another panel held that *Buie* authorized officers to conduct a protective sweep following a consent entry into the defendant's apartment. *See United States v. Garcia,* 997 F.2d 1273, 1282 (9th Cir. 1993).

The Third, Fourth and Eleventh Circuits have not yet had an opportunity to decide the issue.

This Court should grant certiorari to resolve the conflict among the circuit courts.

## II. The Question Presented is of Considerable National Importance

The Fourth Amendment, embodying the "centuries-old principle of respect for the privacy of the home," *Wilson v. Layne*, 526 U.S. 603, 610 (1999), provides that "[t]he right of the people to be secure in their persons, *houses*, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. Const., Amend. IV (emphasis added). This Court has long held that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court, Eastern District of Michigan*, 407 U.S. 297, 313 (1972). The Court has held, moreover that "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 587 (1980) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971)).

The "central importance of the Fourth Amendment," *Alderman v. United States*, 394 U.S. 165, 203 (1969) (Fortas, J., concurring in part and dissenting in part), was recognized by Justice Jackson in his dissent in *Brinegar v. United States*:

> 'Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where

> homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.
>
> But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

338 U.S. 160, 180-81(1949).

Routine protective sweeps of homes in non-arrest situations raise precisely the specter of uncontrolled searches and seizures of which Justice Jackson wrote. Police officers visit homes every day for a myriad of reasons unrelated to arresting someone—interviewing witnesses, community outreach, medical emergencies, to name but a few. The question of whether the police can conduct protective searches with less than probable cause or even reasonable suspicion in their day-to-day encounters in the homes of this country's citizenry is indeed of national importance.

## III. A Uniform Standard is Necessary

"[T]he protection of the Fourth . . . Amendment[] 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement'." *New York v. Belton,* 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 142).